Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

Review of the Commission's Regulations Governing Television Broadcasting

MM Docket No. 91-221

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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SUMMARY

The Commission's reexamination of its structural regulation of the television industry was inspired by overwhelming evidence of the new competitive and marketplace realities faced by broadcasters in the 1990's -- evidence that compels prompt and sweeping deregulation of TV stations and networks. Incremental relaxation of burdensome and outdated regulations is not enough; the Commission's deregulatory actions must be as dramatic as the marketplace changes to which they respond.

In the current environment, much of the Commission's regulatory structure is no longer necessary to foster diversity and competition. Indeed, the Commission's structural restrictions are counterproductive, reducing the competitive strength of the broadcast industry and, consequently, the diversity of the programming available to viewers. Relief from these regulations is particularly critical for the traditional broadcast networks, who continue to suffer erosion of market share and competitive position. NBC, ABC and CBS must have the ability to develop new business opportunities and revenue streams if they are to continue to maintain their service to affiliates and the public.

Commission rules and policies should foster reinvestment

in the television business. Instead, regulations that are no longer needed today prevent television stations and networks from pursuing opportunities in their own industry, forcing them to venture into other businesses or to cut costs in order to maintain profitability.

In order to preserve the competitive viability of this country's unique free, over-the-air broadcast system, NBC urges the Commission to substantially modify or repeal its rules affecting television stations and networks as follows:

1. <u>The national multiple ownership rule should be significantly relaxed by raising the numerical limit to 18 television stations and the household reach limit to 35%</u>. This interim level of deregulation is the reasonable and necessary next step toward the total elimination of this rule which the record supports.

The Commission's national multiple ownership rule is no longer necessary to ensure diversity and competition, which are guaranteed by the proliferation of video outlets and programming sources which exist today. Moreover, while there is no evidence that group ownership reduces diversity or competition, the Commission's staff has recognized that service to the public may be enhanced through the efficiencies and economies of common station ownership. The commitment of NBC's owned stations to news, public affairs and local service provides a concrete example of the public interest benefits of group ownership.

The stringent multiple ownership caps that exist today limit television broadcasters' ability to maximize revenues and capitalize on economies of scale. This is particularly problematic for the three traditional networks. Station ownership, which has always been an important component of the network business, has become increasingly critical to the financial survival of NBC, CBS and ABC as the network business becomes at best a break-even proposition. Network owned stations provide a reliable revenue stream which supports the huge investment in network programming. Station ownership also gives assurance of at least minimal clearance of network programming necessary to attract national advertisers. Because their owned stations need a source of high quality, expensive programming, networks are encouraged to invest in such entertainment, news and sports programs. In short, increased station ownership would provide critical support to network operations, as well as the financial incentive to stay in the network business.

2. <u>The duopoly rule should be modified to prohibit only Grade A contour overlaps and, even within the Grade A contour, to permit VHF/UHF, and UHF/UHF, combinations so long as at least six independently owned stations remain after the combination</u>. The current rule is no longer necessary to preserve diversity and deprives broadcasters of efficiencies that would make them more competitive and financially healthy. The proposed modification would achieve the proper balance between increasing the competitiveness of local television stations and preserving some regulatory threshold of diverse ownership.

3. <u>The dual network rule should be eliminated</u>. This rule prevents existing networks from developing new and diverse sources of broadcast programming, thereby depriving stations and viewers of a broader range of program choice and reducing competition among program suppliers. While the original rationale for this 50-year-old rule has disappeared with the proliferation of distribution outlets and program sources, the cost to the public of maintaining it has increased, as networks are foreclosed from a growing number of business

opportunities available to their non-broadcast competitors. Concerns that elimination of this rule would prevent the launch of other national programmers, or that networks might engage in "anticompetitive conduct," are totally unfounded and belied by the realities of today's marketplace.

4. The rule that prohibits network ownership of stations in certain markets, and the rule that regulates "dual" affiliations in certain markets, should be repealed. Both these rules are anachronistic and unnecessary. The former has never been applied by the Commission, even though raised repeatedly in cases over the past 35 years. The latter today only affects at most a handful of markets across the country. The Commission should also use this opportunity to clarify that network ownership of an independent station in markets in which it has an affiliation with another station is not a violation of any Commission rule.

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COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC"), by its attorneys, files these Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-referenced proceeding.

I. INTRODUCTION

New marketplace and competitive realities have appropriately led the Commission to reexamine a number of regulations which were adopted in an entirely different competitive environment, and which today "may reduce the ability of broadcasters to respond competitively and to continue offering services that advance the public interest."[1] The Commission is right to take action to address what has become an outdated regulatory scheme. Today, the only effect of many of the Commission's rules is to limit artificially the ability of local television stations and over-the-air television networks to survive as strong competitors. NBC hopes the overwhelming evidence of the new competitive realities that broadcasters face, as presented to the Commission by its own staff,[2] will lead the Commission to sweep away much of its regulation of television broadcasters. Incremental relaxation of these burdensome regulations is not enough; the Commission's actions must be as dramatic as the marketplace changes to which they respond.

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[1] Notice ¶7.

[2] Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (1991)(hereinafter "OPP Report"). Additional evidence concerning these marketplace changes can be found in comments filed by NBC, CBS and ABC in MM Docket No. 90-162 (proceeding to evaluate the Financial Interest and Syndication Rules); comments filed by NBC on November 21, 1991 in MM Docket No. 91-221 (Notice of Inquiry to review the policy implications of the changing video marketplace); and comments filed by NBC on March 23, 1992 in MM Docket No. 82-434 (proceeding to review the network cable cross-ownership prohibition).

In this proceeding, the Commission is reexamining its structural regulation of television, which includes rules that limit the extent and nature of ownership opportunities broadcast stations and networks can pursue in their own industry. The original rationales for these regulations evaporated long ago. The rules are no longer necessary to ensure the public receives television programming from diverse sources; the dramatic changes in the marketplace have guaranteed that diversity will exist. They are no longer necessary to foster competition; competition in the marketplace is fierce and will intensify as video outlets continue to proliferate. Nor do these regulations advance the Commission's foremost policy goal -- to maximize service to the public. Indeed they are counterproductive. By limiting vertical and horizontal integration and preventing greater efficiencies and economies of scale, these restrictions reduce the diversity of programming available to viewers and the competitive strength of the broadcast industry.

Relief from archaic regulation is particularly critical for the broadcast networks, who have seen their audience, revenues and profit margins erode significantly over the past several years. The network business is no longer a healthy one. Last year, for the first time ever, all three network businesses lost money; three-network revenues declined by 5% between 1990 and 1991, the largest drop on record; three-network viewing dropped to 54.6% of the prime time audience, an all time low. While the networks' decline may become less precipitous in the future, there appears to be no early end to the deterioration of their market share.

The traditional networks' competitive decline should be of concern to the Commission as it shapes regulatory policy for the 1990's. The networks continue to be the primary source of news, entertainment and sports programming for the American public, including those who cannot afford to pay for television. And the networks remain the backbone of this country's unique over-the-air system of broadcasting, which combines the locally based service of over 600 individual affiliated television stations with the networks' high quality national and international news, sports and entertainment programs. No single station, particularly those in small markets which are not attractive to national advertisers or other national program suppliers, could provide this level of service on its own.

In order for the networks to continue to maintain their service to the public as a whole and to large and small affiliates across the country, they must be able to develop additional revenue streams. As the Commission recently noted in connection with its decision on network-cable ownership:

> [A]ccess to new revenue streams could help the television networks compete more effectively with multichannel providers in the video marketplace; it also could benefit the viewing public by enabling the networks to allocate additional funds to develop a greater diversity of programming.[3]

In fact, the Commission, we believe, has understated the problem. Without additional revenue streams, we believe the long term survival of full service broadcast networks is in jeopardy. Ownership of additional television stations and the ability to operate additional broadcast networks are both logical ways for networks to expand their business operations and generate additional revenues to help support their core network business. Commission regulations that are no longer needed should not stand in the way.

More broadly, if only broadcasters are burdened by regulations that limit their opportunities to generate additional revenues and control costs through efficiencies of scale, this country's unique over-the-air system will continue

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[3] Report and Order in MM Docket No. 82-434, released July 17, 1992, ¶11.

its competitive decline. Only those with access to pay services will enjoy the breadth and quality of television service that has historically been available to the entire public. The Commission recently noted in its radio deregulation proceeding that "[t]he industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[4] The same precept applies to the television industry. Commission rules and policies should foster investment in the television business, rather than force TV stations and networks to cut operations and personnel for want of a better way to maintain profitability.

NBC therefore urges the Commission to repeal or substantially modify its national ownership limitations, the duopoly rule, the dual network rule, and the other rules affecting the network station ownership and the network-affiliate relationship that are covered in the Notice.

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[4] Report and Order in MM Docket No. 90-140, 7 FCC Rcd 2755, 2760)(1992).

II. THE COMMISSION'S STATION OWNERSHIP RULES SHOULD BE SUBSTANTIALLY RELAXED

A. The National Multiple Ownership Rule

1. The Multiple Ownership Limits Are Unnecessary And Inhibit The Ability Of Television Stations To Compete

The Commission's national multiple ownership rule[5], which since 1984 has limited the number and audience reach of stations a single entity can own to 12 stations and 25% of television households, was first applied to television in 1941.[6] In its 1953 amendment to the rule, the Commission stated that the purpose of the rule was to further the Commission's policy of "diversification of program service viewpoints" and to "prevent any undue concentration of economic power."[7] Under this version of the rule, a single entity could own no more than five stations, and there was no household coverage cap. The rule was later amended to allow entities to own seven stations if two of them were UHF. Television Multiple Ownership Rule, 11 RR 1519 (1955). Thirty

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[5] 47 CFR Section 73.3555(d).

[6] 6 F.R. 2284.

[7] 18 FCC 288, 292-93 (1953).

years later, the Commission admitted that this so-called Rule of Seven was based on "prognostication, not empirical proof." It was assumed that a national ownership limit of seven television stations would achieve the Commission's stated regulatory goals, but these assumptions were not based on hard evidence.[8]

In a rulemaking commenced in 1983, the Commission reexamined its assumptions against the backdrop of a vastly changed marketplace and the real-world experience gained under its regulatory scheme. It concluded:

- That the multiple ownership rule was unnecessary and irrelevant to the achievement of viewpoint diversity, and indeed might be an obstacle to the broadcast of programming that would more adequately serve viewers' needs and interests;

- That fundamental and profound marketplace changes had ensured the existence of diversity, and had obviated any

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[8] Report and Order in Gen. Docket 83-1009, 100 FCC 2d 17, 24 (1984).

threat to competition or danger of monopolistic power or control;

- That new information indicated that group owners did not impose monolithic viewpoints on their stations, and that group owned outlets presented more issue oriented programming than stations that were individually owned. Moreover, to the extent group ownership fostered efficiencies of scale, additional resources might become available for investment in programming. Thus, increased group ownership might actually further the policy goals the rule was trying to achieve.[9]

Initially, the Commission decided to increase the station ownership limit to 12 immediately and in addition, because the case for repeal of the rule was so strong, order that in 1990 even that modified restriction would be sunsetted. However, on reconsideration, the Commission backed away from an automatic sunset, citing the possibility of a precipitous or radical restructuring of the television industry.[10] The

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[9] Id. at 19-20.

[10] Memorandum Opinion and Order in Gen. Docket 83-1009, 100 FCC 2d 74, 89, 96-97 (1985).

Commission instead decided to take a "more cautious" approach, confirming the increase in the numerical ownership limit to 12 stations, but also imposing a household coverage cap of 25% and eliminating the automatic sunset.

The Commission has now had ample experience under the modified multiple ownership rule. It also has abundant evidence of marketplace change and the current state of diversity and competition in the video industry. The same analysis the Commission conducted in 1983 should again lead inexorably toward elimination or substantial relaxation of current national ownership restrictions.

First, the multiple ownership rule is now even more irrelevant to the goal of diversity than it was in the early 1980's. In 1984, the Commission was confident that diversity would be guaranteed by the proliferation of video outlets and program sources. That confidence is totally vindicated by the fact that today viewer choice at both the local and national levels is far greater than it was eight years ago.

Since the Commission last examined the multiple ownership rules, the number of television stations has grown from 1,169 to nearly 1500[11]; cable passes over 90% of U.S. homes (vs. 64% in 1984) and 65% of those homes subscribe (up from 40%[12]); a fourth national broadcast network has been successfully launched; first-run syndication has become a major source of original programming for television stations; there are over 100 national and regional cable programming networks;[13] and many other multichannel program providers are gaining penetration and competitive strength. Today the average home can receive 36 different channels of programming -- 12 of them from over-the-air television signals.[14]

As the Notice points out, even those arguing for the regulatory status quo do not deny the enormous expansion in the number of outlets available to viewers and in the alternative sources of video programming. There is also consensus that the competitive structure of the broadcast industry has been altered for the long term. There will be no return to an era where a few broadcast companies "dominate"

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[11] Notice ¶3.

[12] Nielsen Home Video Index, June, 1992.

[13] Notice ¶3.

[14] Nielsen Television Index Special Release: Television Audience 1991.

the video landscape. In the environment of this decade and beyond, the idea that diversity of viewpoints needs to be -- or indeed could be -- protected by government regulation of television station ownership patterns is patently ridiculous.[15]

Second, the proliferation of outlets and program sources has increased competition in the video marketplace to the point that any possibility of monopoly power or control by a few entities has completely evaporated. Nowhere is the effect of this competition more evident than in the migration of viewers and advertisers away from the traditional broadcast stations and networks to newer competitors such as cable and first-run syndication. Broadcasters' declining audience, revenue shares and profits are documented in the OPP Report

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[15] In its earlier rulemaking, the Commission also questioned whether, since viewers' access to video outlets is locally based, a national ownership cap is even relevant to the diversity of viewpoints available to television viewers in individual communities. We agree that there seems to be a logical disconnect between the Commission's stated concern and the regulatory remedy it chose. We also agree with the Commission's 1984 conclusion that the market relevant to diversity concerns includes not only television outlets, but radio, cable, other video media and numerous print media as well. 100 FCC 2d at 25.

and cited in the Notice.[16]

The Commission's historical concern was that broadcasters -- particularly the networks -- would dominate and control the television marketplace. Today its concern should be whether broadcasters will be able effectively to compete against a growing number of local and national media. Commission regulations should not protect broadcasters (or any medium) from competition. However, the time has come to eliminate regulations, adopted when broadcasting had no competition, which today are unnecessary and debilitating.

Third, there is still no evidence that group ownership reduces diversity or competition; on the other hand, as the OPP Report recognized

> In today's market...common ownership of larger numbers of broadcast stations nationwide...may permit exploitation of economies of scale and reduce costs or permit improved service."[17]

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[16] Notice at ¶¶4-6. These declines have seriously weakened the economic base of the industry. According to the NAB's 1992 NAB/BCFM Television Financial Report, 40% of all television stations lost money in 1991, including over 25% of the stations affiliated with the three original broadcast networks, and 50% of all independent stations.

[17] OPP Report supra, 6 FCC Rcd at 4103.

The public indeed benefits from increased station group ownership. The savings that flow from efficiencies and economies of scale support group owners' investment in news, public affairs and local programming, in new technology, and in community service.[18] NBC's owned stations are a case in

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[18] The Commission has asked parties to comment on a study submitted by the Office of Communication of the United Church of Christ ("OC/UCC"), which purports to demonstrate that any savings from the efficiencies of increased group ownership since 1984 have not been invested in additional local programming (Notice, fn. 23). NBC submits the OC/UCC study does not support the proposition that increased group ownership has yielded no benefit to the public, or that it has in fact resulted in less local service. As a preliminary matter, and as the Commission notes, the study covers only 5 markets -- none of which is in the top 25 markets -- a sample that is too small and skewed to support any meaningful conclusions. Second, OC/UCC's data indicate that the amount of local news and public affairs programming broadcast by <u>all</u> station types -- including those owners that added to the number of stations they controlled -- increased over the five year period studied. At the end of the period, the only program category in which individually owned stations broadcast more local programming than group owners who had increased their complement of stations was local public affairs, and there the difference was a statistically insignificant .4%. Third, the data indicate that group owned stations broadcast more <u>total</u> (local and national) public affairs programming than individually owned stations in both 1984 and 1989. Fourth, by 1989 individually owned stations had yet to reach the level of local news broadcast by group-owned stations 5 years earlier. According to OC/UCC's own data, in 1989 owners that had increased the number of stations they controlled broadcast 9% more local news than they had in 1984, and 16% more local news than their separately owned counterparts. (footnote continued)

point. Attached as Exhibit I is a summary of the six NBC-owned stations' commitment to local news and public affairs programming. The Exhibit shows that since 1990, the average NBC owned station has devoted 51% of its total expenditures to local news and public affairs programs. The amount of time each NBC owned station devotes to local news and public affairs programs ranges from 24 to almost 46 hours per week -- on average 23% of the 6:00 AM to midnight time period. NBC owned stations have also devoted considerable resources to special programming and local projects of great value to their local communities.

The fourth factor the Commission must consider is the adverse effect of overly stringent national ownership restrictions on the ability of broadcast networks and stations

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(footnote continued)

Thus it appears that apart from a statistically insignificant difference in the amount of local public affairs programming presented in 1989 by stations that had increased their station ownership vs. stations that remained individually owned, OC/UCC's data actually support the proposition that (1) increased group ownership has in general resulted in more news and public affairs programming, and (2) group owned stations offer viewers more news (local and national) and more total public affairs programming than stations that are individually owned.

to remain competitive. There are no limits on the number of cable systems one entity can own nationwide or on how many households those systems can serve.[19] Yet broadcasters are limited in the number and reach of the television stations they can control. Limiting broadcasters' ability to maximize potential revenue from station ownership, as well as to capitalize on savings derived from the efficiencies of group ownership, compounds the difficulty of competing against unregulated media with two revenue streams.

Station ownership, which has always been an important aspect of networking, is now critical to the financial survival of NBC, CBS and ABC as the network business itself becomes at best a break-even proposition. In balancing its desire to foster diversity against other policy considerations, the Commission has long recognized that:

> The multiple ownership of broadcast stations does play an important role in our nation-wide broadcast system. The ownership of broadcast stations in major markets by networks, for example, is an important element of network broadcasting.[20]

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[19] The glaring exceptions, of course, are network like NBC, CBS and ABC, who once again have been uniquely saddled with restrictions on the extent to which they can own cable systems both nationwide and in local markets. See, Report and Order in MM Docket No. 82-434, supra.

[20] Report and Order in Docket 10822, 43 FCC 2797, 2801-2 (1954).

In balancing its policy goals today, the Commission must realize that with the abundance of outlets and program sources that exist, ownership of distribution confers no particular competitive advantage on the networks. On the other hand, station ownership is vital to the networks' very existence. Owned stations provide networks with a steadier, more predictable revenue stream than the volatile networking business. The profits from station ownership provide the networks with the resources they need to invest in expensive entertainment and sports programs, and to maintain costly newsgathering and production operations. As competing program services vie for affiliate air time,[21] station ownership gives networks assurance that their programs will receive at least the minimal level of national clearance to attract national advertisers, making the enormous investment in programming economically worthwhile.

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[21] Paramount and Warner Brothers have both announced they will compete with the original broadcast networks for clearance of major first-run entertainment series on local affiliates in prime time. Wall Street Journal, February 12, 1992; New York Post, February 13, 1992.

The fact that their owned stations need a source of, and profit from, high quality, expensive programming encourages networks to invest in such entertainment, news and sports programs. These programs are also offered to the network's affiliates, including those in markets too small to make a meaningful economic difference to the network in terms of national audience or advertising revenues. In short, station ownership provides broadcast networks with an incentive to stay in the network business, and supports the level and scope of network program service the public and independently-owned affiliated stations rely on.

2. The Multiple Ownership Limits Should Be Relaxed To 18 Stations/35% TV Household Coverage

In light of these considerations, NBC urges the Commission to substantially relax its current ownership restrictions at this time by raising the numerical limit to 18 television stations and the household reach limit to 35%. We believe the record supports total elimination of the multiple ownership rule. But in deference to the Commission's historical desire to proceed incrementally in this area -- despite the obvious need for more fundamental regulatory change -- NBC is proposing an interim level of deregulation. A limit of 18/35% would permit a reasonable increase in group ownership without diminishing diversity, without raising the